

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0270**

In the Matter of the Civil Commitment of: Brad Ronald Stevens.

**Filed August 30, 2021
Affirmed
Reyes, Judge**

Commitment Appeal Panel
File No. AP19-9157

Brad Ronald Stevens, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Emily B. Anderson, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

Stephen F. O’Keefe, Goodhue County Attorney, Erin L. Kuester, Assistant County Attorney, Red Wing, Minnesota (for respondent Goodhue County)

Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant argues that a Commitment Appeal Panel (the CAP)¹ erred by dismissing his petition for provisional discharge or full discharge from civil commitment as a sexually dangerous person (SDP) to the Minnesota Sex Offender Program (MSOP). He further

¹ We refer to the entity formerly known as the supreme court appeal panel, or statutorily as the judicial appeal panel, as the CAP. See Minn. Stat. § 253D.28, subd. 1(a) (2020) (providing for review by “the judicial appeal panel established under section 253B.19, subdivision 1”).

argues that the CAP lacked subject-matter jurisdiction over this case and that he received ineffective assistance of counsel. We affirm.

FACTS

Appellant Brad Ronald Stevens was indeterminately civilly committed as an SDP in 2005 following several sexual-assault convictions between 1993 and 2003. *In re Commitment of Stevens*, No. A15-2054, 2016 WL 3376062, at *1 (Minn. App. June 20, 2016). When appellant failed to participate in sex-offender treatment, he was incarcerated. He returned to the MSOP in 2014 when his criminal sentence expired.

In September 2018, appellant petitioned the Special Review Board (SRB) for a transfer to community preparation services, provisional discharge, or full discharge from his civil commitment. Respondents Minnesota Commissioner of Human Services and Goodhue County opposed appellant's petition. In October 2019, the SRB recommended that appellant's petition be denied. The next month, appellant petitioned the CAP for rehearing and reconsideration of his provisional-discharge and discharge petitions. Due to delays caused by the COVID-19 pandemic, the CAP held a first-phase hearing on October 2 and 9, 2020. With the assistance of counsel, appellant submitted hundreds of pages of materials and called three witnesses at the first-phase hearing.

Appellant submitted a self-authored "SRB report." Much of this report consists of appellant's legal and factual arguments, including assertions that he engages in prosocial behavior, does not require treatment, participates in Scientology courses instead of MSOP's treatment program, and does not suffer from a mental illness or sexual disorder. The exhibits attached to appellant's SRB report include: (1) records from his clinical

supervisor, social worker Nicole Vaino, and his MSOP unit supervisor, Brian Ninneman, recounting appellant's good behavior; (2) records showing appellant's progress in the Five Tier Program, a new MSOP program which rewards good behavior; (3) treatment records showing appellant's participation in some individual treatment; and (4) various psychological examinations and reports.

The psychological evaluations attached to appellant's SRB report show that clinicians at MSOP diagnosed him with other specified paraphilic disorder (OSPD), other specified personality disorder with antisocial and narcissistic traits, and alcohol-, cannabis- and cocaine-use disorders. One evaluator, Dr. Robert Riedel, concluded in his 2016 report that appellant had a low likelihood of reoffending. In an updated report in 2017, Dr. Riedel notes that appellant has a "five-year recidivism rate of 10.1" which is "above average for Minnesota released sex offenders," but appellant could not be considered "likely" or "highly likely" to reoffend. Dr. Riedel rejected a full discharge but supported provisional discharge.

Aside from his SRB report, appellant submitted the affidavit of Dr. Frederick Winsmann. Dr. Winsmann states that an OSPD diagnosis, absent a specifier, is not a valid mental disorder. Dr. Winsmann opines that other diagnoses, such as "personality disorder not otherwise specified" with what Dr. Winsmann describes as "ad hoc variations of behaviors," should likewise not be accepted.

Appellant also submitted to the CAP an updated self-authored SRB report, discharge plan, and provisional discharge plan, all dated September 8, 2020. The CAP accepted the updated SRB report but did not receive the discharge plan or provisional-

discharge plan into evidence. Finally, appellant submitted letters of support from his relatives and a member of the Church of Scientology.

Appellant called three witnesses: MSOP Clinical Director Katherine McDowell, Mr. Ninneman, and court-appointed examiner Dr. Christine Bowerman.

Ms. McDowell testified that appellant refused to participate in group treatment and that appellant had not “participated [in treatment] in a manner that would suggest progress towards amenability to treatment needs.”

Mr. Ninneman testified that he supervised the unit where appellant lived and that appellant displayed prosocial behavior, was a positive influence, achieved tier five, the highest tier, on MSOP’s Five Tier program, and helped with conflict resolution on the unit.

Dr. Bowerman testified to the following: that appellant’s treatment needs include identifying dynamic risk factors;² that appellant’s refusal to participate in treatment limits the information available to determine whether his dynamic risk factors have increased or decreased over time; that she diagnosed appellant with narcissistic personality disorder with antisocial features, but not a sexual disorder; that appellant has not addressed his risk factors sufficiently to justify reduction in custody; and that appellant’s proposed provisional-discharge plan was “almost verbatim” the standard provisional-discharge-plan conditions and would not sufficiently protect the public.

² Ms. McDowell explained that dynamic risk factors are those that can change over time, such as social network, living circumstances, commitment to work, and involvement in leisure activities. Static risk factors are those that a person cannot change, such as offense history and past behavior. And protective factors are those that reduce the person’s overall risk.

At the conclusion of appellant's evidence, respondents moved to dismiss appellant's petition under Minn. R. Civ. P. 41.02(b), arguing that he failed to establish a prima facie case for provisional discharge or full discharge. The CAP granted respondents' motion to dismiss. This appeal follows.

DECISION

I. The CAP has subject-matter jurisdiction over this matter.

Appellant argues that the CAP lacked subject-matter jurisdiction over this case because he no longer has a mental illness. We disagree.

A tribunal has subject-matter jurisdiction if it has the "authority to hear and determine a particular class of actions" *and* "the particular issues the court assumes to decide." *Irwin v. Goodno*, 686 N.W.2d 878, 880 (Minn. App. 2004) (quotations omitted) (concluding CAP erred by dismissing committed person's petition for lack of subject-matter jurisdiction). We review de novo whether a tribunal has subject-matter jurisdiction. *Id.*

The CAP is authorized by statute to hear petitions of involuntarily committed persons for rehearing and reconsideration of the SRB's recommendations on reduction of custody petitions. *See* Minn. Stat. § 253D.27-.31 (2020). Appellant's petition to the CAP as an involuntarily committed person for rehearing and reconsideration of the SRB's recommendation and the particular arguments he raises regarding provisional discharge and full discharge fall specifically within that statutory authority. And the CAP's statutory authority enables it to determine whether a committed person's status, regardless of whether the person has a validly diagnosed mental illness, warrants reduction in custody.

Minn. Stat. §§ 253D.29, subd. 1(a), .30, subd. 1(a), & .31. Therefore, the CAP had subject-matter jurisdiction to consider this type of action and these particular issues.

II. Standard of review

A person civilly committed as an SDP may seek a reduction in custody by petitioning for transfer, provisional discharge, or full discharge. Minn. Stat. § 253D.29-.31 (2020). The person first files a petition with the SRB, which conducts a hearing and issues a recommendation to the CAP. Minn. Stat. § 253D.27, subd. 2 (2020). The person may seek rehearing and reconsideration of the SRB’s recommendation by petitioning the CAP. Minn. Stat. § 253D.28, subd. 1 (2020). CAP hearings typically proceed in two stages. The CAP holds a first-phase hearing during which the civilly committed person bears the burden of production of “presenting a prima facie case with competent evidence to show that the person is entitled to” discharge or provisional discharge. *Larson v. Jesson*, 847 N.W.2d 531, 535 (Minn. App. 2014) (quotation omitted). To make a prima facie case, the petitioner must produce “sufficient, competent evidence that, if proven, would entitle the petitioner to [the] relief” he seeks. *Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013). If the petitioner satisfies that burden, the CAP next holds a second-phase hearing at which the respondent bears the burden of proving “by clear and convincing evidence that the discharge or provisional discharge should be denied.” *Id.* (quotation omitted).

After the first-phase hearing, the respondent may move to dismiss the petition under Minn. R. Civ. P. 41.02(b) if it believes that the petitioner has not made a prima facie case for relief. *Id.* In considering a motion to dismiss under rule 41.02(b), the CAP may not weigh evidence or make credibility assessments. *Id.* It must view the evidence in the light

most favorable to the petitioner. *Id.* However, “[c]onclusory assertions by a committed person,” standing alone, are insufficient to avoid dismissal under rule 41.02(b). *In re Civil Commitment of Poole*, 921 N.W.2d 62, 69 (Minn. App. 2018), *review denied* (Minn. Jan. 15, 2019). This court reviews de novo the CAP’s dismissal of a full-discharge or provisional-discharge petition. *Id.*

III. The CAP did not err by dismissing appellant’s petition for provisional discharge.

Appellant argues that he provided sufficient evidence that, if proved, would make a prima facie case that he is entitled to provisional discharge and asserts that the CAP erred by failing to view his evidence in the light most favorable to him. We disagree.

“A civilly committed person shall not be provisionally discharged unless [he] is capable of making an acceptable adjustment to open society.” Minn. Stat. § 253D.30, subd.

1(a). Two factors inform the CAP’s decision whether to grant provisional discharge:

- (1) whether the committed person’s course of treatment and present mental status indicate there is *no longer a need for treatment and supervision in the committed person’s current treatment setting*; and
- (2) *whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public* and will enable the committed person to adjust successfully to the community.

Id., subd. 2(b) (emphasis added).

A. Need for treatment and supervision

Here, appellant submitted no evidence that outpatient treatment can meet his needs. It is undisputed that appellant has not participated in sex-offender treatment. Additionally, he is diagnosed with narcissistic personality disorder, which contributed to his sexual-

offending behavior. Dr. Bowerman testified that appellant needs inpatient treatment and supervision to discern and address his treatment needs, that the record contains no evidence that outpatient treatment would adequately meet appellant's needs, and that treatment in a secure setting is the most appropriate treatment option for appellant.

Appellant argues that the record demonstrates his present prosocial mental status and good behavior. We commend appellant for his achievements and good behavior while at MSOP. But general good behavior alone does not satisfy appellant's burden, which is to present evidence demonstrating that he no longer needs treatment and supervision in his current setting. The record contains no evidence that appellant has identified his risk factors or accepted them as such, let alone obtained and progressed in treatment for them. Rather, both Dr. Bowerman and Ms. McDowell testified that appellant remains in need of treatment and supervision.

Appellant argues that he engages in alternative treatment, including meeting individually with a primary therapist, and takes Scientology courses. But nothing in the individual-therapy records indicates that appellant no longer needs treatment in his current setting. To the contrary, his MSOP therapists conclude that he needs further treatment in his current setting. And appellant's uncorroborated, conclusory assertion that Scientology courses address his risk factors cannot satisfy his burden. *Poole*, 921 N.W.2d at 69.

Relying on Dr. Winsmann's affidavit stating that OSPD without specifier and personality disorder without specifier are not valid diagnoses, appellant argues that he no longer needs treatment because he does not have a mental or sexual disorder. But Dr. Bowerman diagnosed appellant with narcissistic personality disorder, which she

opined contributed to his sexual offending in the past and remains an issue for appellant. Dr. Winsmann's affidavit does not address this diagnosis. Thus, even accepting Dr. Winsmann's affidavit, the record does not support appellant's argument that he does not have a mental or sexual disorder.

Finally, appellant argues that the CAP failed to view the evidence in the light most favorable to him. Specifically, he argues that the CAP should have accepted Dr. Riedel's report and Mr. Ninneman's testimony. But even accepting their testimony, neither one addressed the relevant factors that the CAP must consider for determining whether to grant provisional discharge or full discharge. We therefore conclude that the CAP did not err by determining that appellant failed to make a prima facie case that he no longer needs treatment and supervision.

B. Provisional-discharge plan

Because a prima facie case for a provisional discharge must address both factors of Minn. Stat. § 253D.30, subd. 1(b), appellant's failure to make a prima facie case on the first factor is fatal to his petition for provisional discharge. In the interest of completeness, however, we address the second factor. *See In re Welfare of Children of M.L.S.*, __ N.W.2d __, __ (Minn. App. Jun. 28, 2021) (addressing question in interests of completeness); *see generally* Minn. R. Civ. App. P. 103.04 (allowing appellate court to address questions in interest of justice).

Here, Dr. Bowerman testified that appellant's provisional-discharge plan would not provide sufficient protection to the public. There is no evidence to counter Dr. Bowerman's testimony on this point. No other witness opined on this matter, and

appellant's conclusory statements to the contrary cannot satisfy his burden. *Poole*, 921 N.W.2d at 69. Appellant did not offer an outpatient treatment plan as part of his provisional-discharge plan. Similarly, he offered no evidence that the behaviors making him dangerous to the public have been reduced. We therefore conclude that appellant failed to carry his burden to provide evidence that, if proved, would demonstrate that his provisional-discharge plan adequately protects the public.

Appellant argues that Dr. Bowerman's conclusion is deficient because she did not review his *updated* provisional-discharge plan that he had submitted to the CAP. Assuming appellant is referring to the September 8, 2020 updated provisional-discharge plan,³ his argument fails. The CAP "may not grant . . . provisional discharge on terms or conditions that were not presented to the [SRB]." Minn. Stat. § 253D.28, subd. 3 (2020). The SRB did not review appellant's updated plan because he submitted it 11 months after the SRB made its recommendation. Because he did not timely submit the updated plan to the SRB, neither Dr. Bowerman nor the CAP could have reviewed it at the time of the CAP's decision.

Appellant also relies on letters of support from relatives and the Church of Scientology to argue that his provisional-discharge plan adequately protects the public and will assist his transition to society. These letters show that appellant has support in place if he is released from MSOP. But they do not demonstrate that appellant's provisional-

³ Appellant references two updated plans in his briefing: one dated July 4, 2019 and another dated September 8, 2020. In this context, it appears he is referring to the September plan.

discharge plan sufficiently protects the public or that appellant's dangerousness has been reduced.

In sum, appellant failed to make a prima facie case for provisional discharge, and the CAP therefore did not err by dismissing his petition under Minn. R. Civ. P. 41.02(b).

IV. The CAP did not err by dismissing appellant's petition for full discharge.

Appellant asserts that: (1) he no longer needs treatment because he has no sexual disorder, his diagnosed mental disorder does not impact his behavior, and his present mental status shows he does not need treatment and (2) he is no longer a danger to the public because he has low risk-of-recidivism scores and has shown good behavior at MSOP. We are not persuaded.

A person committed as an SDP "shall not be discharged unless . . . the committed person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of treatment and supervision." Minn. Stat. § 253D.31. But "the criteria for a provisional discharge are more lenient than the criteria for a [full] discharge." *Larson*, 847 N.W.2d at 535-36. Therefore, the committed person's failure to make a prima facie case for provisional discharge means that he cannot succeed on his petition for full discharge. *Id.* at 536. Because appellant failed to make a prima facie case for provisional discharge, we conclude that he likewise failed to make a prima facie case for full discharge.

V. Appellant's ineffective-assistance-of-counsel claim is not properly before this court.

Appellant argues that he received ineffective assistance of counsel because his attorney failed to submit the correct records to the CAP. The commissioner⁴ argues that appellant's ineffective-assistance-of-counsel claim is not properly before this court. We agree with the commissioner.

We generally do not address issues not presented to nor considered by the lower court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellant raised his ineffective-assistance-of-counsel claim in a motion to the district court under Minn. R. Civ. P. 60.02 brought concurrently with this appeal. As a result, the CAP did not consider or determine his ineffective-assistance-of-counsel claim. This claim is therefore not properly before this court, and we decline to address it.

Affirmed.

⁴ Respondent Goodhue County did not file a brief in this appeal.